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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 210

RIN 0584-AD57

Marketing and Sale of Fluid Milk in Schools

AGENCY: Food and Nutrition Service, USDA.

ACTION: Interim rule.

SUMMARY: This interim rule implements legislative provisions to prohibit direct or indirect restrictions on the sale or marketing of fluid milk on school premises or at school-sponsored events, at any time or in any place, in schools participating in the National School Lunch Program. This rule is intended to ensure that there are no policies or procedures in place that have the effect of restricting the sale or marketing of fluid milk. In addition, we are making a nonsubstantive change by converting a section heading from a question to a statement. This is intended to conform the heading to the same style as all other section headings in the part.

DATES: *Effective Date:* This rule is effective December 21, 2005.

Comment Date: Comments on this rule must be postmarked on or before May 22, 2006 to be assured of consideration. Comments will also be accepted via E-mail submission, at the address listed below. E-mail submissions must be received no later than 11:59 p.m. on May 22, 2006 to be assured of consideration.

ADDRESSES: The Food and Nutrition Service invites interested persons to submit comments on this interim rule. Comments may be submitted by any of the following methods:

- *E-mail:* Send comments to CNDPROPOSAL@FNS.USDA.GOV. The subject line must contain the phrase

“Marketing and Sale of Fluid Milk in Schools”.

- *Fax:* Submit comments by facsimile transmission to: (703) 305-2879, attention Mr. Robert Eadie. Since comments are being accepted simultaneously on several separate rulemakings, please label your comments on this interim rule as, “Marketing and Sale of Fluid Milk in Schools”.

- *Mail:* Comments should be addressed to Mr. Robert Eadie, Chief, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302-1594.

- *Hand Delivery or Courier:* Deliver comments to 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302-1594, during normal business hours of 8:30 a.m.–5 p.m.

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.

All submissions will be available for public inspection at 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302-1594, Monday through Friday, 8:30 a.m.–5 p.m.

FOR FURTHER INFORMATION CONTACT: Mr. Christopher Davenport, School Programs Section, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service at 703-305-2590.

SUPPLEMENTARY INFORMATION:

Background

Section 102 of the Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108-265) amended section 9(a)(2) of the Richard B. Russell National School Lunch Act by adding a provision that prohibits schools participating in the National School Lunch Program (NSLP), or any person approved by a school participating in the NSLP, from directly or indirectly restricting the sale or marketing of fluid milk products at any time or in any place on school premises or at school-sponsored events.

This rulemaking uses the term “fluid milk”, as described in 7 CFR 210.10(m)(1)(ii), instead of the term “fluid milk products” as used in Public Law 108-265. Although the Agricultural Marketing Service (AMS) of USDA has established a Federal definition for

“fluid milk products” found at 7 CFR 1000.15; the Department prefers instead to continue to rely upon the each individual State’s definition of fluid milk. Use of the AMS definition would have required identifying a list of allowable and unallowable milk-derived items that would be extensive, frequently changing and perhaps impossible to define.

This provision may affect vending contracts, in that the intent of Public Law 108-265 is to ensure that exclusive vending contracts do not have the effect of preventing the sale or marketing of milk on school premises. The statute has the effect of prohibiting local educational agencies (LEAs) from entering into contracts that restrict the sale or marketing of fluid milk. The requirements for offering fluid milk as a part of a reimbursable lunch in the NSLP are described in 7 CFR 210.10(m) and are not changed by this interim rule.

A 2000 study sponsored by the Centers for Disease Control and Prevention, the School Health Policies and Programs Study, indicates that 54.6 percent of the school districts reported having a contract with a beverage company. In some instances, such vending contracts may limit a school’s ability to offer other types of food choices outside of the school meal programs, including fluid milk. However, based on discussions with State agencies, we understand that very few if any current vending contracts actually limit the sale or marketing of fluid milk.

Per Public Law 108-265, the effective date of this provision was July 1, 2005. Therefore, there may be LEAs with existing contracts in place that contain provisions which conflict with the statutory provision and this rulemaking. To come into compliance with these requirements, these LEAs may either conduct a new procurement or amend these existing contracts to conform with the statute. LEAs should consult with their legal counsel to determine the appropriate course of action. In either case, the action should be taken at the earliest possible date, but no later than the renewal of the current procurement contract, or the beginning of School Year 2006-2007, whichever comes first. All subsequent contracts must reflect the statutory and regulatory requirements.